U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: APR 2 9 2015 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

for
Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, (director) denied the employment-based immigrant visa petition. The case was reopened and the petition was denied again on February 10, 2014; on June 2, 2014; and again on September 3, 2014. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a staffing business. It seeks to permanently employ the beneficiary in the United States as a nurse supervisor. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).[1]

The director most recently denied the petition because the petitioner did not provide notice of the filing of an ETA Form 9089, Application for Permanent Employment Certification, in accordance with 20 C.F.R. § 656.10(d)(1), did not establish the ability to pay the proffered wage to this beneficiary in addition to the other beneficiaries for whom it had petitioned, and did not establish that the beneficiary met the experience requirement of the labor certification.

The record shows that the appeal is properly filed, timely, and makes an allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

Notice of Filing

The employer must provide notice of the filing of an ETA Form 9089 to any bargaining representative for the occupation, or, if there is no bargaining representative, by posted notice to its employees at the location of the intended employment. *See* 20 C.F.R. § 656.10(d)(1).

The regulation at 20 C.F.R. § 656.10(d)(3) states that the Notice shall:

(i) State that the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;
(ii) State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
(iii) Provide the address of the appropriate Certifying Officer; and
(iv) Be provided between 30 and 180 days before filing the application.

[1] Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees, whose services are sought by an employer in the United States.

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Notices for Schedule A occupations must also contain a description of the job offered and the rate of pay. *See* 20 C.F.R. § 656.10(d)(6).

In cases where there is no bargaining representative, the Notice must be posted for at least 10 consecutive business days, and it must be clearly visible and unobstructed while posted. 20 C.F.R. § 656.10(d)(1)(ii). The Notice must be posted in a conspicuous place where the employer's U.S. workers can readily read it on their way to or from their place of employment. *Id.* In addition, the Notice must be published "in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions in the employer's organization." *Id.* The satisfaction of the Notice requirement may be documented by "providing a copy of the posted notice and stating where it was posted, and by providing copies of all the in-house media" used to distribute the Notice. *Id.*

In the most recent decision, the director stated that the notice of job posting that was submitted by the petitioner was deficient because the petitioner "failed to provide a copy of the job opportunity notice posted at the beneficiary's actual intended worksite." On appeal, the petitioner provides a copy of a "Notice of Filing of Application Under the U.S. Department of Labor's Permanent Labor Certification Program." The petitioner affirmed that this notice was posted from July 9, 2012, through July 27, 2012, on the HR Bulletin Board at the location identified on the petition as the beneficiary's intended place of employment. However, this notice indicates a rate of pay of $77,710 per year, which is below the rate of pay listed on the ETA Form 9089 of $77,750 per year. Therefore, the petitioner has failed to satisfy the posting requirements as stated above.

Ability to Pay the Proffered Wage

The director also found that the petitioner has not established its continuing ability to pay the proffered wage as of the November 26, 2012, priority date. The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The proffered wage as stated on the ETA Form 9089, Application for Permanent Employment Certification, is $77,750 per year. The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established on January 1, 2004, to have a gross annual income of $18,000,000.00, and to currently employ 110 workers. According to the tax returns in the record, the petitioner's fiscal year follows the calendar year. On the labor certification, the beneficiary did not claim to have worked for the petitioner.

In determining the petitioner's ability to pay the proffered wage, United States Citizenship and Immigration Services (USCIS) first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.[3] If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967).

According to USCIS records, the petitioner has filed Form I-140 petitions on behalf of numerous other beneficiaries. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

The petitioner's tax returns reflect the following net income[4] and net current assets[5]:

	Net Income	Net Current Assets
2012	$268,175	$57,061
2013	$76,495	$165,552

Although the petitioner's net income was greater than the proffered wage of the instant beneficiary in 2012, and the petitioner's net current assets were greater than the proffered wage of the instant beneficiary in 2013, the petitioner has filed Form I-140 petitions for eighteen different beneficiaries. The director's decision noted that the petitioner would need to provide specific evidence in order to demonstrate its ability to pay the proffered wage for each of these I-140 beneficiaries from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Specifically, the director noted that the petitioner had failed to provide the receipt number for all

[3] *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), aff'd, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

[4] Forms 1120S, U.S. Income Tax Return for an S Corporation. Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed February 13, 2015) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, credits, deductions, or other adjustments shown on the Schedule K of its 2012 and 2013 tax returns, the petitioner's net income is found on Schedule K of its tax returns for those years.

[5] Net current assets are the difference between the petitioner's current assets and current liabilities. A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18.

petitions filed by the petitioner, the proffered wage of each beneficiary, the priority date of each beneficiary, evidence of any wages paid to each beneficiary since 2012, evidence showing whether each petition was pending, approved, or denied and whether any beneficiary had obtained lawful permanent resident status.

On appeal, the petitioner acknowledges these other beneficiaries and provides some of the requested information. However, the petitioner failed to provide all of the necessary evidence that was identified in the director's decision. Most importantly, the petitioner did not provide any evidence of wages paid to these other beneficiaries. In addition, while petitioner states that eleven of the 18 other beneficiaries had adjusted to permanent resident status, the petitioner did not establish when those adjustments of status occurred.[6] Without the specifically requested information regarding the petitioner's other filings, we cannot determine that the petitioner had the ability to pay all of its beneficiaries their proffered wage from the priority date onward.

Therefore, the petitioner had not established that it had the continuing ability to pay the instant beneficiary and all of its other beneficiaries the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Beneficiary Qualifications

The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany* v. *Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coomey,* 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires a bachelor's or foreign equivalent degree and 60 months of experience in the offered job of nurse supervisor. The labor certification states that experience in an alternate occupation is not acceptable.[7] On the labor certification, the beneficiary claims experience as an operating room nurse and as a registered nurse; however, the beneficiary claimed no experience as a nurse supervisor. The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification

[6] Even if all eleven of those beneficiaries adjusted to permanent resident status before the priority date of the current beneficiary, it is noted that the combined proffered wages of the remaining seven beneficiaries is $424,041, which exceeds the petitioner's net income and net current assets in both 2012 and 2013.

[7] The requirements listed on the labor certification in Parts H.6 and H.10 (five years of experience as a nurse supervisor with no alternate occupation allowed) conflict with the requirements stated in Part H.14 ("any combination of education and work experience...including five years of experience as a registered nurse."). The petitioner has not provided an explanation for this inconsistency.

by the priority date. Therefore, the petitioner has also not established that the beneficiary is qualified for the offered position.

Schedule A

Beyond the decision of the director, on appeal, we have identified an additional issue that will be discussed, specifically that the petitioner did not submit evidence that it did not have to file for certification through the U.S. Department of Labor (DOL).[8]

The petition is for a Schedule A occupation. A Schedule A occupation is an occupation codified at 20 C.F.R. § 656.5(a) for which the DOL has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of aliens in such occupations. The current list of Schedule A occupations includes professional nurses and physical therapists. *Id.* Petitions for Schedule A occupations do not require the petitioner to test the labor market and obtain a certified ETA Form 9089 from the DOL prior to filing the petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petition is filed directly with USCIS with a duplicate uncertified ETA Form 9089. *See* 8 C.F.R. §§ 204.5(a)(2) and (l)(3)(i); *see also* 20 C.F.R. § 656.15.

The instant Form I-140 immigrant petition does not meet the requirements for Schedule A because the position is not one for a professional nurse, but rather is for a nurse supervisor. The duties for the offered position, as listed on the ETA Form 9089, are as follows:

> Supervise RNs, LPNs and CNAs, set up work schedules, assign duties to nursing staff, and ensure that each member of the nursing team is adequately trained, ensure that nursing records are correctly maintained, that report is correctly given at each shift change, and that equipment and the other supplies are in stock; plans and organizes activities in nursing services, such as obstetrics, pediatrics, or surgery, or for two or more patient-care units to procedures; coordinate activities with other patient care units. Consult with the Director of Nursing on nursing problems and interpretation of hospital policies to ensure patient needs are met.

According to the Occupational Outlook Handbook (OOH), the job duties for a professional nurse include:

- Record patients' medical histories and symptoms.
- Administer patients' medicines and treatments.
- Set up plans for patients' care or contribute to existing plans.
- Observe patient and record observations.

[8] We may deny an application or petition that fails to comply with the technical requirements of the law even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that we conduct appellate review on a *de novo* basis).

- Consult with doctors and other healthcare professionals.
- Operate and monitor medical equipment.
- Help perform diagnostic tests and analyze results.

The above job duties are all central to patient care. The job duties of the instant position of nurse supervisor do not involve any patient care. Rather the job duties of nurse supervisor as listed above are focused on administration of nurses. As the job duties of a nurse supervisor as described in the instant petition are substantially different from those of a professional nurse, it has not been established that the proffered position may be classified as a Schedule A occupation, one for which the DOL has determined that there are not sufficient U.S. workers.

Therefore, the petitioner has not established that the proffered job of nurse supervisor is a Schedule A, Group I occupation, as it fits within the definition of professional nurse under 20 C.F.R. § 656.5. The petitioner has not established that a labor certification is not required for the proffered position. The regulation at 8 C.F.R. § 204.5(a)(2) specifies that the Form I-140 petition filed on behalf of the beneficiary must be supported by an individual labor certification from the DOL. If the petition is not supported by a certified ETA Form 9089, the petition cannot be approved.

Debarment

Also beyond the decision of the director, the petition may not be approved pursuant to a February 18, 2015, Memorandum from Donald Neufeld, Associate Director, Service Center Operations, listing the petitioner as a debarred entity. Pursuant to the memo, no immigrant visa petitions and no H, L, O, or P-1 nonimmigrant visa petitions filed with respect to the petitioner shall be approved for a period commencing on August 1, 2014, and ending on July 31, 2015.[9]

The petitioner in this case was the subject of an investigation by the DOL in accordance with the H-1B provisions of the Act. *See generally* 20 C.F.R. § 655 related to Temporary Employment of Aliens in the United States; and 8 C.F.R. § 214.2(h) provisions related to H-1B nonimmigrants. If DOL determines that there has been a violation of 20 C.F.R. § 655, then under 20 C.F.R. § 655.855(c), USCIS shall not approve a petition during the debarment period: USCIS "shall not approve petitions filed with respect to that employer under sections 204 or 214(c) of the INA (8 U.S.C. 1154 and 1184(c)) for the period of time provided by the Act and described in Sec. 655.810(f)."[10]

[9] *See* http://www.dol.gov/whd/immigration/H1BDebarment.htm (accessed March 13, 2015).

[10] We note that certain statutes that preclude USCIS from approving applications effectively require that USCIS deny the application. For instance, the language of Sections 204(c), (d), and (g) of the Act all similarly provide that "notwithstanding [the relevant applicable subsections] . . . no petition shall be approved if [the following facts are present]." Further, on October 21, 1998, President Clinton signed into law the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, which incorporated several immigration-related provisions, including the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA). ACWIA mandated new requirements for petitioners filing for H-1B beneficiaries. Pursuant to ACWIA, penalties were established for H-1B violations on a three tier system: (1) the first tier would encompass non-willful conduct, or less substantial violations such as failure to meet strike, lockout or layoff attestations; failure to meet notice or recruitment attestations; or

Conclusion

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

misrepresentation of a material fact on a labor condition application, and would result in fines of not more than $1,000 per violation and result in the mandatory debarment of at least one year. *See* ACWIA § 413(a) incorporated at 212(n)(2)(C)(i) of the Act; (2) willful violations, such as willful failure to meet any attestation condition; willful misrepresentation; or actions taken in retaliation against whistleblowers, which would result in a fine of not more than $5,000 per violation, and mandatory debarment of two years. *See* ACWIA § 413(a) incorporated at 212(n)(2)(C)(ii) of the Act; and (3) willful violations that result in layoffs, such as a violation of the attestation, or misrepresentation of a material fact in the course where an employer displaces a U.S. worker, which would result in a fine not to exceed $35,000 per violation, and mandatory debarment of at least three years. *See* ACWIA § 413(a) incorporated at 212(n)(2)(C)(iii) of the Act.